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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 MARTINEZ S. AYTCH,

9 *Petitioner,*

3:10-cv-00767-RCJ-WGC

10
11 vs.

ORDER

12 ROBERT LEGRAND, *et al.*,

13 *Respondents.*
14

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16 This represented habeas matter under 28 U.S.C. § 2254 comes before the Court on
17 petitioner's motion (#35) to stay, together with a declaration with a title that reflects that it,
18 *inter alia*, abandons Ground 6.

19 ***Background***

20 Petitioner Martinez Aytch challenges his 2008 Nevada state conviction, pursuant to a
21 jury verdict, of two counts of grand larceny and one count of burglary and his adjudication as
22 a habitual criminal. He is serving four concurrent life sentences with the possibility of parole
23 after ten years.¹ He sought relief both on direct appeal and state post-conviction review. His
24 motions for appointment of counsel on state post-conviction review were denied.

25 In this action, the Court has held that a number of grounds are unexhausted. Petitioner
26 seeks a stay of the mixed petition under *Rhines v. Weber*, 544 U.S. 269 (2005), to return to
27 state court to exhaust the unexhausted grounds.

28

1#19, Ex. 25.

Discussion

In order to obtain a stay under *Rhines* to return to the state courts to exhaust a claim or claims, a petitioner must demonstrate that there was good cause for the failure to exhaust the claims, that the unexhausted claims include at least one claim that is not plainly meritless, and that petitioner has not engaged in intentionally dilatory litigation tactics. See 544 U.S. at 278.

Good Cause

While the precise contours of what constitutes “good cause” in this context remain to be fully developed, there nonetheless are guideposts, as discussed further below.

Respondents urge that the Court should apply an “extraordinary circumstances” standard drawn from equitable tolling law. Under respondents’ formulation, a petitioner apparently would have to show that he had been pursuing his rights diligently but an extraordinary circumstance made it impossible for him to exhaust the claims previously. Respondents acknowledge, however, that the Ninth Circuit has held that a requirement that the petitioner show “extraordinary circumstances” to obtain a stay does not comport with the good cause standard in *Rhines*. See *Jackson v. Roe*, 425 F.3d 654, 661-62 (9th Cir. 2005). The Court cannot ignore the holding in *Jackson*.²

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²Moreover, the Court would be reluctant to import standards from equitable tolling or procedural default case law that are designed to assess whether a petition or claim should be dismissed with prejudice, *i.e.*, with conclusive finality, and which on occasion may require an evidentiary hearing. Arguably, such heightened standards – directed to the question of whether, in the final analysis, a claim is conclusively procedurally barred – are inappropriate for the preliminary procedural question of whether a stay should be entered while petitioner fully exhausts claims in a mixed petition. It generally is more appropriate for the state courts to have the opportunity in the first instance to consider the application of conclusive procedural bars. *Cf. Gonzalez v. Wong*, 667 F.3d 965, 980 (9th Cir. 2011), *cert. denied*, 133 S.Ct. 155 (2012)(noting that, in the circumstances presented, a stay was appropriate because it provided the state court with the first opportunity to resolve the claim). The Court is not sanguine that it should adopt standards that could require an evidentiary hearing in order to resolve the preliminary procedural issue presented by a request for a stay.

If the bar that must be cleared under *Rhines* were as high as that necessary to establish either equitable tolling or cause-and-prejudice, the Supreme Court and the Ninth Circuit know quite well how to invoke such established standards. To date, neither has done so. The Ninth Circuit instead has stated to the contrary in *Jackson* that an “extraordinary circumstances” standard does not comport with the *Rhines* good-cause standard.

On the other hand, *Rhines* instructs that a stay should be available only in “limited circumstances,” and the requirement of good cause therefore should not be interpreted in a manner that would render stay orders routine. *Wooten v. Kirkland*, 540 F.3d 1019, 1024 (9th Cir. 2008). Accordingly, a mere impression by a petitioner that a claim was exhausted is not sufficient to establish good cause for a failure to exhaust, given that, if it were, “virtually every habeas petitioner, at least those represented by counsel, could argue that he thought his counsel had raised an unexhausted claim and secure a stay.” *Id.* (emphasis in original).

Petitioner urges that “a pro se petitioner’s failure to adequately raise claims may constitute ‘good cause.’” Petitioner relies upon Judge Reed’s decision in *Riner v. Crawford*, 415 F.Supp.2d 1207 (D. Nev. 2006), as support for the proposition that good cause may be established by, *inter alia*, “either by [the petitioner’s] own ignorance or confusion about the law or the status of the case.” 415 F.Supp.2d at 1211.

Judge Reed’s own words perhaps are the most instructive as to the precedential reach of *Riner*, particularly in the context of intervening controlling Ninth Circuit authority:

... The undersigned concluded in *Riner v. Crawford*, 415 F.Supp.2d 1207 (D.Nev. 2006), following upon the Ninth Circuit’s holding in *Jackson*, that the good cause standard under *Rhines* therefore is not so strict a standard as to require a showing of some extreme and unusual event beyond the control of the petitioner to warrant a stay. 415 F.Supp.2d at 1210.[FN3] On the other hand, *Rhines* instructs that a stay should be available only in “limited circumstances,” and the requirement of good cause therefore should not be interpreted in a manner that would render stay orders routine. *Wooten v. Kirkland*, 540 F.3d 1019, 1024 (9th Cir. 2008), *cert. denied*, ___ U.S. ___, 129 S.Ct. 2771, 174 L.Ed.2d 276 (2009). Accordingly, a mere impression by a petitioner that a claim was exhausted is not sufficient to establish good cause for a failure to exhaust, given that, if it were, “virtually every habeas petitioner, at least those represented by counsel, could argue that he *thought* his counsel had raised an unexhausted claim and secure a stay.” *Id.* (emphasis in original).

[FN3] In *Riner*, the Court’s order was issued following a remand from the Ninth Circuit for reconsideration of its dismissal order in light of the intervening authority in *Rhines*. The Court did not hold that *Riner* either had or had not demonstrated good cause. The order instead gave *Riner* an opportunity to demonstrate good cause and the other requirements for a *Rhines* stay. *Riner*

thereafter did not seek such a stay but instead sought reconsideration of the Court's prior holding that the claims . . . were unexhausted. *See, e.g.,* No. 3:99-cv-0258-ECR-RAM, #72. The published *Riner* decision therefore did not make a definitive holding as to good cause applicable to a then-attempted specific factual demonstration of good cause.

Vincent v. McDaniel, 3:10-cv-00181-ECR-RAM, #23, at 6-7 & n.4 (D. Nev. July 15, 2011).³

Judge Reed's subsequent expressions accordingly clearly instruct that *Riner* made no definitive holding as to good cause, that he in fact never even was called upon to make such a definitive holding in *Riner*, and, perhaps most significantly, that his early *dicta* in passing over seven years ago in *Riner* indisputably did not and could not override intervening Ninth Circuit precedent such as *Wooten*.

Under controlling law, a stay should be available only in limited circumstances, the requirement of good cause should not be interpreted in a manner that would render stay orders routine, and broad assertions that could be argued by "virtually every habeas petitioner" do not establish good cause. *Wooten, supra*.

If, as petitioner suggests, "a pro se petitioner's failure to adequately raise claims constituted 'good cause,'" then in each and every case in which a *pro se* petitioner did not exhaust claims, he by definition would demonstrate good cause. Petitioner simply has conflated the lack of exhaustion itself with good cause for failure to exhaust. That clearly is not the law under *Rhines* and *Wooten*. It effectively would read the good cause requirement out of *Rhines*, because any *pro se* petitioner who failed to exhaust any claim whatsoever would demonstrate good cause. That, again, clearly is not the law.

If the petitioner's own ignorance or confusion about the law or the status of the case generally constituted good cause, then, similarly, good cause would be present in each and every case in which a *pro se* petitioner failed to exhaust claims. In that circumstance, each

³*Accord Greene v. McDaniel*, 3:09-cv-00601-ECR-VPC, #42, at 3 & n.2 (D. Nev. April 4, 2012)(similar analysis); *Taylor v. McDaniel*, 3:08-cv-00401-ECR-VPC, #59, at 2 & n.3 (D. Nev. April 5, 2011)(similar); *see also Navas v. Baca*, 3:10-cv-00647-RCJ-WGC, 2013 WL 837095, at *14 n.21 (D. Nev. Mar. 5, 2013)(quoting *Greene* with regard to the precedential impact of *Riner* in relation to later controlling Ninth Circuit case law).

1 and every *pro se* petitioner could argue that he was ignorant or confused about the law or the
 2 status of his case, rendering stay orders not only routine but available merely for the asking.
 3 *Cf. Wooten, supra*. That is not the law, and that is not the law that Judge Reed followed as
 4 subsequent controlling Ninth Circuit law became available in the years following the
 5 superceded passing *dicta* in *Riner*.

6 In short, the Court will not find good cause in essence simply because the petitioner
 7 was proceeding *pro se* in the state courts, subject to the remaining discussion herein.⁴

8 The Court finds more merit in petitioner's at least indirect reliance upon *Martinez v.*
 9 *Ryan*, 132 S.Ct. 1309 (2012). In *Martinez*, the Supreme Court held in pertinent part that a
 10 petitioner may establish cause to potentially overcome a procedural default for a failure to
 11 pursue a claim of ineffective assistance of trial counsel in initial-review collateral proceedings,
 12 such as a state post-conviction proceeding in a state district court, "where the state courts did
 13 not appoint counsel in the initial-review collateral proceeding for a claim of ineffective
 14 assistance at trial." 132 S.Ct. at 1318. As the Court elaborated in *Martinez*:

15 Without the help of an adequate attorney, a prisoner
 16 will have similar difficulties [as he would pursuing substantive
 17 claims on a *pro se* direct appeal] vindicating a substantial
 18 ineffective-assistance-of-trial-counsel claim. Claims of ineffective
 19 assistance at trial often require investigative work and an
 20 understanding of trial strategy. When the issue cannot be raised
 21 on direct review, moreover, a prisoner asserting an
 22 ineffective-assistance-of-trial-counsel claim in an initial-review
 23 collateral proceeding cannot rely on a court opinion or the prior
 24 work of an attorney addressing that claim. *Halbert*, 545 U.S., at
 25 619, 125 S.Ct. 2582. To present a claim of ineffective assistance

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 27 ⁴Petitioner contends in the reply that the motion to stay does not rely only upon his *pro se* status to
 28 establish good cause. He urges that he instead suggested in the motion "that his ignorance of the law
 combined with his request for counsel and his obvious desire to raise every potentially viable claim provides
 good cause." #42, at 2. However, it would appear that a *pro se* litigant is typified by being (a) ignorant of the
 law, (b) not represented by counsel, and (c) desirous of raising every potentially viable claim. Petitioner thus
 simply has relied upon the paradigm characteristics of a *pro se* litigant to argue that he is not relying upon his
pro se status to establish good cause. The Court is not persuaded by such a circular rationale.

The Court otherwise does not find that any of the other cases cited from this district support the
 broad proposition advanced with regard to *pro se* status allegedly establishing good cause. To the extent, if
 any, that cases cited from outside the district *arguendo* would support the proposition advanced, neither
 those cases nor in truth prior cases from within the district constitute binding authority in other actions.

1 at trial in accordance with the State's procedures, then, a prisoner
2 likely needs an effective attorney.

3 The same would be true if the State did not appoint an
4 attorney to assist the prisoner in the initial-review collateral
5 proceeding. The prisoner, unlearned in the law, may not comply
6 with the State's procedural rules or may misapprehend the
7 substantive details of federal constitutional law. *Cf., e.g., id.*, at
8 620–621, 125 S.Ct. 2582 (describing the educational background
9 of the prison population). While confined to prison, the prisoner
10 is in no position to develop the evidentiary basis for a claim of
11 ineffective assistance, which often turns on evidence outside the
12 trial record.

13 132 S.Ct. at 1317.

14 If such a petitioner later is appointed counsel on federal habeas review and raises an
15 unexhausted claim of ineffective assistance of trial counsel, the *only* way for the state courts
16 to have the first opportunity to consider the application of state procedural bars to the claim
17 and possibly the merits is via a stay of the federal proceedings. *Cf. Gonzalez v. Wong*, 667
18 F.3d 965, 980 (9th Cir. 2011), *cert. denied*, 133 S.Ct. 155 (2012)(noting that, in the
19 circumstances presented, a stay was appropriate because it provided the state court with the
20 first opportunity to resolve the claim). It would have done the *pro se* state petitioner little good
21 to file a second state petition without counsel, as he likely would have been no more equipped
22 to effectively pursue a second *pro se* petition as he had been on the first. Thus, once counsel
23 thereafter is appointed on federal habeas review and raises unexhausted claims of ineffective
24 assistance of trial counsel, again, the *only* procedure by which the state courts will have the
25 first opportunity to consider the application of state procedural bars and/or the merits is on a
26 federal stay.

27 Accordingly, absent countervailing circumstances not presented here, the Court is
28 inclined to find that a petitioner in this procedural posture has demonstrated good cause
under *Rhines* when he promptly seeks to return to state court to pursue claims of ineffective
assistance of trial counsel that the petitioner did not pursue in state district court post-
conviction proceedings in which appointment of counsel was denied to an indigent petitioner.

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1 Such a conclusion cuts a fairly broad swath. However, the swath cut appears to follow
2 from an application of *Martinez* read together with *Rhines*. Once it is established that a
3 petitioner potentially can demonstrate cause to overcome a procedural default of an
4 unexhausted claim of ineffective assistance of trial counsel because he was not appointed
5 counsel in the state district court proceedings, then principles of federalism and comity
6 strongly counsel in favor of the state courts having the first opportunity to consider the
7 application of state procedural bars and/or the merits of the claim. *Cf. Gonzalez, supra*.

8 That said, *Martinez* is not unlimited in scope. The *Martinez* holding does not apply to
9 claims other than claims of ineffective assistance of trial counsel. Accordingly, a petitioner
10 seeking a stay to pursue only substantive claims and/or claims of ineffective assistance of
11 appellate counsel would not be able to establish good cause for a stay on the basis that he
12 was denied appointed counsel in the state post-conviction proceedings. The *Martinez* holding
13 further applies in this context only to an absence of counsel in the initial-review collateral
14 proceedings, *i.e.*, in Nevada, the post-conviction proceedings in the state district court. A
15 petitioner that was represented in the state district court proceedings thus would not be able
16 to establish good cause in this regard based upon his thereafter proceeding *pro se* on the
17 state post-conviction appeal. As discussed at length above, *pro se* status, standing alone,
18 does not establish good cause under *Rhines* in all applications and contexts.

19 The Court further notes that the March 2012 decision in *Martinez* still is relatively
20 recent; and the full ramifications of the decision, such as in the present context, still are being
21 worked out in following cases. In the present case, *Martinez* was not yet on the books when
22 petitioner pursued state post-conviction relief in the state courts, when federal habeas counsel
23 first was appointed, or when petitioner filed his counseled federal amended petition. The
24 present case thus very much was “in the pipeline” when *Martinez* was decided; and the
25 manner in which the *Martinez* holding relates to this case, as noted, still is being determined.
26 Federal habeas counsel should note that, in future cases, the Court may well take into
27 account the dispatch with which a represented federal habeas petitioner invokes *Martinez* as
28 a basis for a finding of good cause in support of a stay after raising unexhausted claims of

1 ineffective assistance of trial counsel in the counseled amended petition. A petitioner
2 arguably should raise the prospect of a stay on such a basis sooner rather than later in the
3 federal proceedings, and not always only after prompting by a challenge to exhaustion.

4 The Court accordingly finds in the circumstances presented that petitioner has
5 demonstrated good cause under *Rhines*.⁵

6 ***Not Plainly Meritless***

7 Respondents present no argument challenging petitioner's showing in the motion to
8 stay that the unexhausted claims include claims that are not plainly meritless. Under Local
9 Rule LR 7-2(d), the failure to file points and authorities in response to a motion in full or in part
10 constitutes a consent to the granting of the motion to the extent to which no response is
11 made. *E.g., Joseph v. Las Vegas Metropolitan Police Dept.*, 2010 WL 3238992, slip op. at
12 *5 (D. Nev., Aug. 13, 2010). Respondents accordingly have consented to the grant of the
13 motion with regard to this issue in the event that petitioner prevails on the good-cause issue.

14 The Court in any event finds that the claim of ineffective assistance of trial counsel in
15 Ground 2(b) is not plainly meritless.

16 In discussing this criterion, the *Rhines* Court made a comparison cite to 28 U.S.C. §
17 2254(b)(2). 544 U.S. at 277. The Ninth Circuit has held that a district court may reject an
18 unexhausted claim on the merits pursuant to § 2254(b)(2) "only when it is perfectly clear that
19 the applicant does not raise even a colorable federal claim." *Cassett v. Stewart*, 406 F.3d 614,
20 623-24 (9th Cir. 2005).

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23 ⁵*Martinez* further requires that "[t]o overcome the default, a prisoner must also demonstrate that the
24 underlying ineffective-assistance-of-trial-counsel claims is a substantial one, which is to say that the prisoner
25 must demonstrate that the claim has some merit." 132 S.Ct. at 1318. In this procedural context, the relative
26 substance of the claim is appropriately addressed under the *Rhines* requirement that the claim not be plainly
27 meritless. The Court, again, is not deciding the procedural default issue itself but instead is deciding the
28 preliminary procedural question of whether a stay should be granted so that the state courts can make a
potentially definitive holding in the first instance as to, *inter alia*, procedural default. *Rhines* sets the bar for
consideration of the merits of the claim in considering a possible stay at the claim not being plainly meritless.
The Court would note further that the *Martinez* Court referenced the standard for obtaining a certificate of
appealability, which requires only that jurists of reason would find the claim debatable on the merits.

1 Ground 2(b) passes muster under this standard. In Ground 2(b), petitioner alleges that
2 he was denied effective assistance of trial counsel because counsel allegedly failed to
3 investigate codefendant Charma McCollum's mental health or criminal background. The
4 amended petition alleges that McCollum was arrested for failure to appear in the criminal
5 proceeding, that her counsel filed a motion explaining that she had missed the court date due
6 to being hospitalized for mental health issues, that McCollum suffered from bipolar disorder
7 for which lithium had been prescribed, that McCollum testified adversely to petitioner at trial,
8 and that her testimony should have been impeached based upon her condition by suggesting
9 that she suffered from a "neurological deficit" due to her condition that affected her perception
10 and recollection. Based on the present record, the Court cannot say that it is perfectly clear
11 that this claim does not raise even a colorable federal claim of ineffective assistance of trial
12 counsel.

13 The Court accordingly need not reach any question as to the relative merit of the
14 remaining unexhausted claims. The pertinent inquiry is whether the Court should enter a
15 stay, and it need find the presence of only one claim that is not plainly meritless for that
16 limited purpose. The Court need not engage in an inquiry analogous to certifying claims for
17 a certificate of appealability, where every claim must be considered. What claims petitioner
18 pursues during the stay and brings back before the Court is a matter to be determined by
19 petitioner, subject to any then-applicable defenses once the federal case is reopened.

20 ***No Intentionally Dilatory Litigation Tactics***

21 Respondents further present no argument challenging petitioner's showing in the
22 motion to stay that he has not engaged in intentionally dilatory litigation tactics. Under Local
23 Rule LR 7-2(d), the failure to file points and authorities in response to a motion in full or in part
24 constitutes a consent to the granting of the motion to the extent to which no response is
25 made. *Joseph, supra*. Respondents accordingly have consented to the grant of the motion
26 with regard to this issue as well in the event that petitioner prevails on the good-cause issue.

27 Nothing in the record before the Court in any event reflects that petitioner has engaged
28 in intentionally dilatory tactics. While it perhaps is not wholly inconceivable that a noncapital

1 habeas petitioner might engage in such tactics, the relevance of this factor, as a practical
2 matter, largely is restricted to capital cases. *Cf. Lawrence v. Florida*, 549 U.S. 327, 344 & n.
3 9 (2007)(Ginsburg, J., dissenting)("Most prisoners want to be released from custody as soon
4 as possible, not to prolong their incarceration. They are therefore interested in the expeditious
5 resolution of their claims. . . . Though capital petitioners may be aided by delay, they are a
6 small minority of all petitioners."); *Valdovinos v. McGrath*, 598 F.3d 568, 574 (9th Cir. 2010),
7 *vacated for reconsideration on other grounds*, 131 S.Ct. 1042 (2011)(petitioner "had not
8 engaged in dilatory tactics and he had no motivation for delay, as he is not a capital
9 defendant").

10 The motion for a stay accordingly will be granted.

11 IT THEREFORE IS ORDERED that petitioner's motion (#35) to stay is GRANTED and
12 that this action is STAYED pending exhaustion of petitioner's unexhausted claims. Petitioner
13 may move to reopen the matter following exhaustion of the claims, and any party otherwise
14 may move to reopen the matter at any time and seek any relief appropriate under the
15 circumstances.

16 IT FURTHER IS ORDERED that the grant of a stay is conditioned upon petitioner filing
17 a state post-conviction petition in the state district court within forty-five (45) days of entry of
18 this order and thereafter returning to federal court with a motion to reopen within forty-five (45)
19 days of issuance of the remittitur by the Supreme Court of Nevada at the conclusion of all
20 state court proceedings.⁶

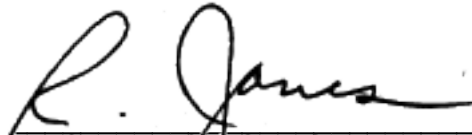
21 IT FURTHER IS ORDERED that, with any motion to reopen filed following completion
22 of all state court proceedings pursued, petitioner: (a) shall attach an indexed chronological
23 set of exhibits (with the corresponding CM/ECF attachments identified by exhibit number(s)
24 on the docketing system) containing the state court record materials relevant to the issues
25 herein that cover the period between the state court record exhibits on file in this matter and
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28 ⁶If *certiorari* review will be sought or thereafter is being sought, either party may move to reinstate the stay for the duration of any such proceedings. *Cf. Lawrence v. Florida*, 549 U.S. 327, 335 (2007).

1 the motion; and (b) if petitioner then intends to further amend the petition, shall file a motion
2 for leave to amend along with the proposed verified amended petition or a motion for
3 extension of time to move for leave. Respondents shall have thirty (30) days to file a response
4 to the motion(s) filed. The reopened matter will proceed under the current docket number.

5 IT FURTHER IS ORDERED that the Clerk of Court shall ADMINISTRATIVELY CLOSE
6 this action until such time as the Court grants a motion to reopen the matter.⁷

7 Dated this 18th day of February, 2014.

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12 ROBERT C. JONES
13 United States District Judge
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20 ⁷No claims in the current pleadings are dismissed by this order. Petitioner filed a declaration (#37)
21 with a title that reflected that the declaration included an abandonment of Ground 6. No such declaration of
22 abandonment in fact was made by petitioner within the body of the filing, and the body of the declaration
23 instead concurs in the seeking of a stay to exhaust, *inter alia*, Ground 6. The Court trusts that the description
24 of the filing in its title was written in error. The Court reiterates what it said about Ground 6 in the order on the
25 motion to dismiss. While the ground would appear to lack merit as an independent federal habeas claim, the
26 ground is unexhausted. If petitioner does not exhaust the ground on the stay and the ground remains in the
27 amended petition after the stay, the entire petition will be dismissed as a mixed petition. See #33, at 25-26.
28 The Court very much would like to not have a continued occasion to spill ink on a ground of such dubious
merit. If petitioner intends to dismiss the ground, he needs to do so effectively, by (a) filing a separate *motion to dismiss* that (b) is accompanied by a declaration by the petitioner that he has conferred with his counsel and concurs in the action being requested. The Court, again, trusts that the variance between the title and the body of the declaration resulted from error. The Court assures petitioner, however, that a failure to effectively seek dismissal of this claim if it is a still-unexhausted claim after the stay will result in the entire petition being dismissed. Similar to the cited discussion in the prior order, petitioner must take definitive action with respect to this unexhausted claim. Hedging, reserving rights, or taking any action other than either exhausting the claim or definitively and effectively seeking its dismissal will result in the dismissal of the entire petition as a mixed petition under *Rose v. Lundy*, 455 U.S. 509 (1982).